United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 10, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: AmerGen Energy Company, LLC, 506-6050-7560
an Exelov/British Energy Company 524-8531-2400
Case 4-CA-32186

This case was resubmitted for advice as to whether the Employer unlawfully discharged two employees and suspended a third individual for participating in a strike at the Employer's nuclear power generating facility.

The Region should issue complaint here, absent settlement. Although the discriminatees had been assigned certain emergency duties at the time they struck, the Employer's practice and policy was to permit relatively short absences of emergency-related personnel from the workplace. Since the gap in coverage due to the employees' concerted walkout was no longer than gaps in coverage that the Employer routinely permits, it was not privileged to discharge and suspend the discriminatees because they participated in the strike.

FACTS

The background to this dispute is set forth in our previous memorandum in this case, dated September 23, 2003. Briefly, we directed the Region to issue a Section 8(a)(1) complaint alleging that the AmerGen Energy Company, LLC issued an unlawfully over-broad threat to discipline all unit employees working at its nuclear generating station should they go out on strike with minimal notice, without regard to individual employees' status as employees who arguably must take "reasonable precautions" to protect the Employer's property under Marshall Car Wheel & Foundry Co.[1]

On May 22, 2003, the day of the strike, the Employer had assigned employees Christopher Ficke and Frederick Gaguski to be on its "Fire Brigade." Members of the Fire Brigade are trained to extinguish some types of fires at the facility, such as a propane fire. Fire Brigade responsibilities are not permanently assigned to any single employee, but rather rotate among trained unit personnel and supervisors throughout the year. The Fire Brigade must

[1] 107 NLRB 314 (1953).

consist of at least five employees at all times. However, section 4.7 of the Employer's Fire Protection Program states that,

> The Fire Brigade composition may be less than the minimum requirements for a period of time not to exceed two (2) hours in order to accommodate unexpected absence provided immediate action is taken to fill the required positions.

On the day of the strike, the Employer had also assigned "Emergency Plan" duties to radiation control technician Richard Brown. In order to prepare for a radiological or other catastrophic emergency, at least three radiological control technicians must be on-duty to monitor and assess potential radiological emissions during an emergency. As with the Fire Brigade, Emergency Plan responsibilities rotate among unit and non-unit personnel throughout the year.

On May 22, Ficke, Gaguski and Brown went out on strike at around 12:00, at the beginning of their 30 minute lunch period. As was the Employer's practice during lunch breaks, the employees turned in their badges at a security gate and departed the facility. As Ficke and Gaguski were departing, supervisory personnel called to them to remind them that they were on the Fire Brigade and to warn them that they had better return to the facility at the end of their lunch period. Brown did not receive a similar warning. In fact, Brown states that the Employer had not notified him that he had been assigned Emergency Plan duties for that day. Within approximately 30 minutes after the start of the strike, the Employer had replaced Ficke, Gaguski and Brown with qualified, available non-unit personnel.

Following the end of the strike on August 11, the Employer discharged Ficke and Gaguski on September 8 and suspended Brown for five days on September 9. The Employer contends that Ficke and Gaguski "engaged in a deliberate act of insubordination" when they ignored a supervisor's order to remain on site, and instead "abandoned" their emergency duties "without proper turnover or relief in order to support a labor action."[2] It contends that the walkout by emergency personnel impeded its ability to respond to any potential emergency situation that may have arisen during the initial stage of the strike.

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[2] The Employer states that it did not discharge Brown because he had not been given a direct order to get proper relief before leaving the facility.

The Employer acknowledges that two supervisors were on-site at the start of the strike and Fire Brigade qualified, and that it further chose to assign a third Fire Brigade-qualified supervisor to replace a striking reactor operator rather than compel the operator to maintain the work station until relieved. Six other Fire Brigade-qualified non-unit personnel were also on-site at the time, undergoing training at a separate building in the facility. In addition, six Emergency Plan-qualified non-unit personnel were on-site at the start of the strike; the Employer acknowledges that they were available to assume Emergency Plan duties.

ACTION

We conclude that the Region should issue complaint, absent settlement. The evidence established that the Employer routinely permitted relatively short absences of emergency-related personnel from the workplace for reasons other than their Union activity. Accordingly, the Employer was not privileged to discharge Fire Brigade and Emergency Plan employees solely because they participated in a strike, where they were replaced with non-striking personnel after a similarly short period of time.

Under Marshall Car Wheel, an employer has the burden to establish that striking employees lost their Section 7 right to strike because of an "indefensible"[3] failure to take "reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work."[4] However, employees need not act as an insurer and need not take every precaution to secure the employer's property for an indefinite period of time.[5]

The Board has found walkouts called with little advance notice to be protected, where there was no foreseeable risk of damage to the Employer's property because the immediate dislocation caused by the walkout was little different than the Employer's routine practices. In Bethany Medical Center, the Board held that employees working in a catheterization laboratory did not lose their statutory right to strike, even though the walkout – called with only 15 minutes notice – resulted in delayed catheterization procedures for five

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[3] Bethany Medical Center, 328 NLRB 1094 (1999).

[4] Marshall Car Wheel & Foundry Co., 107 NLRB at 315.

[5] Reynolds & Manley Lumber Co., 104 NLRB 827, 828-829 (1953), enf. den. 212 F.2d 155 (5th Cir. 1954).

patients.[6] The Board rejected the employer's claim that the sudden work stoppage and concomitant refusal to perform scheduled procedures was "indefensible conduct," in part because the employer tolerated similar delays for reasons other than a concerted walkout.

Similarly, in Vencare Ancillary Services,[7] the Board rejected the employer's assertion that a strike by occupational and physical therapists resulting in the rescheduling of patient appointments constituted "indefensible" unprotected conduct. The Board concluded that the employees' refusal to see patients did not create a foreseeable imminent danger, in part because the effect of the walkout on patient care was little different than the therapists' routine discretion to delay and reschedule patient appointments. In addition, the Board further held that the walkout did not result in a foreseeable risk of harm because other, non-striking therapists were on duty and available to cover for the strikers, if necessary.

We conclude that under the Employer's specific policies and practices, the walkout by Emergency Plan and Fire Brigade personnel and their replacement by non-striking personnel within approximately 30 minutes did not cause a foreseeable risk of imminent danger to the Employer's facility. The Employer contends that by striking without transitioning their duties to other employees, the emergency-related personnel impeded the Employer's ability to respond to any potential emergency situation that may have arisen during the initial stages of the strike.[8] However, the evidence establishes that the walkout by Fire Brigade and Emergency Plan employees resulted in approximately a 30 minute gap in minimum coverage, a circumstance that the Employer permits daily during the lunch period. In addition, the Employer's Fire Protection

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[6] 328 NLRB at 1094-95. The walkout did not violate the strike notice requirements of Section 8(g) because those strictures apply only to labor organizations, not to groups of employees, as in this case.

[7] 334 NLRB 965, 971 (2001).

[8] Although the Employer stated in its discharge letters to Ficke and Gaguski that they were insubordinate when they failed to comply with a directive to return to work at the end of their lunch hour, the Employer does not contend that the alleged insubordination alone warranted discharge. Rather, the Employer stated that discharge was warranted because the walkout created a "safety concern," as set forth above.

Program allows for up to a two hour gap in minimum coverage "to accommodate unexpected absence[s]." The Employer also routinely allows employees, including emergency-related personnel, to leave the facility entirely during their 30 minute lunch period, as the strikers did at the start of the walkout.

In sum, the evidence establishes that the Employer routinely permits short absences of emergency-related personnel from its facility for reasons other than their Union activity. In addition, the Employer was able to secure coverage for the departing strikers within approximately 30 minutes after the start of the strike. This further cuts against the Employer's claim that the walkout posed a foreseeable imminent danger to the facility.[9] Accordingly, the Employer has failed to show that Ficke, Gaguski or Brown's cessation of work during the strike and replacement by non-striking personnel caused a foreseeable risk of imminent danger sufficient to deprive them of statutory protection. Absent settlement, the Region should therefore issue complaint to allege that the employees' discharge and suspension violated Section 8(a)(3).

B.J.K.

[9] See Vencare Ancillary Services, 334 NLRB at 971 (employer's ability to find coverage for departing therapists sufficient to establish no foreseeable risk of harm from walkout); Bethany Medical Center, 328 NLRB at 1095 (in holding employees' walkout protected, Board noted that employer successfully rescheduled catheterization procedures affected by walkout).